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No. 87-750

In the Supreme Court of the United States

OCTOBER TERM, 1987

PAN AMERICAN WORLD AIRWAYS, INC., PETITIONER

v.

ERNESTO SERIO PAMPIN LOPEZ, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF SARA E. LOPEZ, DECEASED, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether an alternative forum exists for purposes of undertaking a *forum non conveniens* inquiry only where all defendants are subject to the jurisdiction of that forum.

2. Whether the limitation prescribed by the Warsaw Convention of an air carrier's liability applies only where notice of that limitation is printed on an airline passenger's ticket in at least ten-point type, as required by the Montreal Agreement.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-80a) is reported at 821 F.2d 1147. The panel opinion of the court of appeals (Pet. App. 81a-96a) is reported at 789 F.2d 1092.

JURISDICTION

The judgments of the court of appeals on rehearing en banc were entered on July 21, 1987 (Pet. App. 103a-106a). On October 12, 1987, Justice White extended the time for filing the petition for a writ of certiorari to and including November 6, 1987. The petition for a writ of certiorari was filed on November 6, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On July 9, 1982, Pan American World Airways Flight 759 crashed near New Orleans, Louisiana, killing all 154 people on board. Petitioner Pan American World Airways, Inc. (Pan Am) was the operator of that flight and the individual respondents, citizens and residents of Uruguay, are heirs of passengers killed in the crash.[1] On August 12, 1982, respondents filed suit in the federal district court of New Orleans against, inter alia, Pan Am, the New Orleans Aviation Board (the operator of the airport) and the Boeing Company (the aircraft manufacturer).[2] The United States was not then named as a defendant. However, the parties anticipated that the United States would be joined as a defendant for claims against the air traffic controllers arising from the crash. In April 1983, respondents commenced administrative proceedings under the Federal Tort Claims Act (FTCA), 28

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[1] Respondent Ernesto Serio Pampin Lopez brought suit for wrongful death and as the survivor of his mother, Sara Lopez de Pampin, his sister, Amparo Pampin Lopez, and his aunt, Irma Lopez de Alvarez. Respondents Luis Alberto and Susanna Electra Trivelloni-Lorenzi brought suit for wrongful death and as survivors of their parents, Luis Alberto and Electra Iris Trivelloni. All of the decedents were citizens and residents of Uruguay who were on vacation in the United States. Pet. App. 3a.

[2] The complaint based jurisdiction upon diversity of citizenship (28 U.S.C. 1332). Of the numerous actions arising from this crash, approximately 52 were filed on behalf of the 42 passengers of Flight 759 who were foreign nationals. All of the actions were transferred by the Judicial Panel on Multi-District Litigation to the Eastern District of Louisiana for pre-trial proceedings. After completion of those proceedings in late 1984, the cases were remitted back to the courts in which they were originally filed for further proceedings. Pet. App. 3a & n.1.

U.S.C. 2671 *et seq.*, against the United States on those claims.[3]

On August 22, 1983, Pan Am moved to dismiss the individual respondents' suit on the ground of *forum non conveniens*. Pan Am advised the court that it would be willing to: (1) submit to the jurisdiction of the courts of Uruguay; (2) concede liability; (3) waive any statute of limitations defense; (4) waive the Warsaw Convention's limitation of damages provision; and (5) guarantee satisfaction of any judgment entered against it in Uruguay. Pet. App. 5a. Based upon those proposed conditions, Pan Am argued that the anticipated joinder of the United States as a defendant was unnecessary (because Pan Am would guarantee payment of any judgment in Uruguay) and that the remaining damage issues could be best tried in Uruguay. In a minute entry docketed September 6, 1983, the district court denied the motion.[4] *Ibid.* After unsuccessfully seeking reconsideration or, alternatively, a certification for interlocutory appeal under 28 U.S.C. 1292(b) from the district court, Pan Am petitioned the court of appeals for a writ of mandamus. On January 18, 1984, the court of appeals denied the request. Pet. App. 5a.

While Pan Am was unsuccessfully seeking interlocutory review on the *forum non conveniens* issue, the individual

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[3] Apparently, at the time respondents initiated their administrative claims, Pan Am had indicated in a sealed minute entry to the district court that Pan Am and the United States were prepared to stipulate to liability (Pet. App. 4a).

[4] At a hearing prior to the filing of Pan Am's motion, the district judge instructed counsel to file the motion, but indicated that it would be denied (Pet. App. 4a-5a, 83a). Anticipating the eventual joinder of the United States, the district judge stated (*ibid.*): "I'm going to rule that you have no right to that transfer * * * [since t]he crash was here and the United States is a party."

respondents, Pan Am, and the United States entered into a stipulation as to liability, damages, defenses and payment under any subsequent judgment (Pet. App. 48a-50a).[5] After the individual respondents' administrative claims under the FTCA were denied, the United States was added as a defendant to this action on February 17, 1984. Prior to trial, the district court also ruled that Pan Am could not avail itself of the $75,000 damages limitation of the Warsaw Convention[6] (as modified by the Montreal Agreement of 1966) because the notice of the liability limitation on the passengers' tickets was in nine-point type, rather than ten-point type, as required by the Montreal Agreement.[7] Following trial, the jury returned a verdict for respondent Lopez of $516,853.89 and for respondents Trivelloni-Lorenzi of $203,530. Pet. App. 7a.

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[5] Under the terms of those agreements, defendants Boeing Company and New Orleans Aviation Board were dismissed with prejudice (Pet. App. 48a).

[6] This treaty, commonly referred to as "the Warsaw Convention," is formally titled the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. app. 1502 note. The United States has been a party to the Warsaw Convention since 1934. Under Article 22(1) of the Convention (49 Stat. 3019), carrier liability was originally limited to 125,000 francs (now approximately $10,000). Pertinent portions of the Warsaw Convention, 49 U.S.C. App. 1502 note, are reproduced at Pet. App. 107a-110a.

[7] The Montreal Agreement is a private agreement among air carriers that raised the limitation of liability to $75,000 from the $10,000 originally established under Article 22(1) of the Warsaw Convention (49 Stat. 3019) (see note 6, *supra*). By signing the Montreal Agreement, air carriers also stipulated that they would "at time of delivery of the tickets, furnish to each passenger governed by the Convention * * *, a notice in ten point type advising international passengers of the limitations of liability." Order of Civil Aeronautics Board Approving Increases in Liability Limitations of Warsaw Convention and Hague

2. A panel of the court of appeals affirmed (Pet. App. 81a-96a). The panel concluded (*id.* at 89a-90a) that the "trial court correctly denied the motion to dismiss on the grounds of *forum non conveniens*." According to the panel (*id.* at 90a), "[t]hese cases should have been tried in the very forum in which they were tried, the place where this tragic accident occurred." The panel also affirmed (*id.* at 90a-91a) the district court's ruling that the Warsaw Convention's liability limitation did not apply because the notice of that limitation on the passenger's ticket was printed only in nine-point type.

3. The court of appeals granted rehearing en banc on the *forum non conveniens* issue and unanimously affirmed (Pet. App. 1a-47a). The majority opinion, joined by fourteen judges, concluded (*id.* at 41a) that the district court had not abused its discretion in denying the motion on the ground that "Pan American had failed to carry its burden of demonstrating that an alternative foreign forum was available to plaintiffs." The court held (*ibid.*) that "it was proper for the court to consider the ultimate presence of the United States as a party in evaluating whether an alternative forum was available to plaintiffs." According to the court, moreover, no alternative forum was available in Uruguay because the United States was not subject to the jurisdiction of any foreign forum. The court rejected Pan Am's contention that its assurances "to pay any judgment rendered in an alternative forum and its consent to submit to the alternative forum's jurisdiction and its underwriter's commitment to guarantee the payment of any judgment made an alternative forum available" (*ibid.*). The court

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Protocol, summarizing C.A.B. Agreement No. 18,900 (May 13, 1966), *reprinted in* 49 U.S.C. app. 1502 note at 1229. See also Order E-23,680, Dkt. No. 17,325 (CAB May 13, 1966), *reprinted in* 31 Fed. Reg. 7302 (1966); 14 C.F.R. 203.1 *et seq.* Pertinent portions of the Montreal Agreement are reproduced at Pet. App. 111a-114a.

stressed (*id.* at 42a (emphasis in original)) that "Pan American and its underwriters guaranteed to pay 'any judgment rendered against *it*,' [but] [t]he 'it' referred to is Pan American and not another defendant such as the United States."[8]

Judge Higginbotham concurred in the judgment (Pet. App. 68a-80a). Judge Higginbotham disputed the majority's threshold ruling that a federal, rather than state, *forum non conveniens* rule should apply in diversity actions. He nonetheless concurred in the judgment because Louisiana has no doctrine of *forum non conveniens*.

ARGUMENT

We share petitioner's general concern that the *forum non conveniens* analysis applied by the court of appeals is unduly rigid. We do not, however, believe that further review is warranted on that ground in this case because affirmance of the district court's denial of Pan Am's motion would be proper even under a more flexible analysis, particularly now that the trial on the merits is complete.

Review of the second question presented by the petition, however, is appropriate either in this case or in another case currently pending before this Court that raises the same issue. Further review would appear warranted to resolve a square conflict that now exists between the court of appeals' decision in this case, which adopts the view of the Second Circuit in *Robles* v. *Lot Polish Airlines* (*In re Air Crash Disaster at Warsaw, Poland on Mar. 14, 1980*),

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[8] The court also noted (Pet. App. 39a-40a) that where, as in this case, the trial on the merits had already occurred, a court of appeals should normally affirm the denial of a motion to dismiss on grounds of *forum non conveniens* "[u]nless the defendant can show that he was greatly prejudiced by the fact that the trial occurred in the particular forum selected by the plaintiff."

705 F.2d 85, cert. denied, 464 U.S. 845 (1983), and the D.C. Circuit's subsequent decision in *In re Korean Air Lines Disaster of September 1, 1983*, 829 F.2d 1171 (1987), petition for cert. pending, No. 87-1055, which adopts the view of the Canada Supreme Court in *Ludecke* v. *Canadian Pac. Airlines, Ltd.*, 98 D.L.R.3d 52 (1979). Although the importance of the issue is less clear—air carriers should be able to prevent the lifting of the Warsaw limitations merely by ensuring that the notice of those limitations is printed on tickets in the required ten-point type—we are ultimately persuaded that the need for uniform construction of the international convention renders further review appropriate.[9] We suggest, moreover, that review might be more appropriate in *Elisa Chan* v. *Korean Air Lines, Ltd.*, petition for cert. pending, No. 87-1055, which raises the identical issue, because in that case, unlike this one, the Court's determination would have a practical impact on the amount of damages ultimately paid by the parties.

1. The court of appeals concluded (Pet. App. 42a) that Pan Am's motion to dismiss for *forum non conveniens* was properly denied because Pan Am had "fail[ed] to make all defendants available to plaintiffs in a Uruguayan forum." We agree with the basic premise that a district court should not dismiss a lawsuit against a particular defendant for *forum non conveniens*, when that defendant cannot be sued in the alternative forum. As this Court has made clear, the "doctrine * * * presupposes at least two

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[9] We initially waived response to the petition in this case because the United States did not actively participate in the litigation in the lower courts. The government did not address either of the two issues presented by the petition in the courts below and it did not participate at all in the en banc proceeding.

forums in which the defendant is amenable to process." *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501, 506-507 (1947); see also *Piper Aircraft Co.* v. *Reyno,* 454 U.S. 235, 254 n.22 (1981).

It does not inexorably follow from that premise, however, that a motion to dismiss for *forum non conveniens* can never be granted as to any defendants in a case involving multiple defendants unless all defendants are subject to the alternative forum's jurisdiction. A district court may sever the action and grant the motion only with respect to those defendants amenable to process in the alternative forum. In an appropriate case, moreover, the court may also stay the proceedings against the remaining defendants in its own forum pending completion of the proceedings in the more convenient forum in order to avoid parallel, and duplicative, proceedings. In some instances, resolution of the controversy in the alternative forum may effectively end any need for further litigation in the initial forum.

Of course, because "the central focus of the *forum non conveniens* inquiry is convenience" (*Reyno,* 454 U.S. at 249), the need to sever would weigh heavily against the grant of a defendant's motion—indeed, as a practical matter, it would be dispositive of the motion in most cases. But, contrary to the court of appeals' ruling, the need to balance the private and public interest factors is not wholly precluded as a matter of law in those circumstances any more than it is where additional third-party defendants may need to be interpleaded (see *Gilbert,* 330 U.S. at 511), or "where the law of the alternative forum is less favorable to the plaintiff than the law of the forum chosen by the plaintiff" (*Reyno,* 454 U.S. at 238, 247). See generally *Gilbert,* 330 U.S. at 508-509; *Koster* v. *American Lumbermens Mut. Casualty Co.,* 330 U.S. 518, 527

(1947). The doctrine of *forum non conveniens* therefore provides the district courts with flexibility at least to consider the possibility that dismissal should be ordered with respect to some of the defendants and not others (cf. *Watson* v. *Merrell Dow Pharmaceuticals*, 769 F.2d 354 (6th Cir. 1985)),[10] and it allows the courts of appeals to conclude that a district court has abused its discretion by failing to do so.

This case underscores the importance of considering the circumstances of each case. In conjunction with its motion to dismiss, petitioner, supported by its insurers (Pet. 3 n.5), offered to: (1) submit to the jurisdiction of the Uruguayan courts; (2) concede liability; (3) waive any statute of limitations defense; (4) waive the Warsaw Convention limitation of damages; and (5) guarantee satisfaction of any judgment entered against it in Uruguay. Pet. App. 5a. In our view, this proposed stipulation renders much less important the amenability of the United States to suit abroad—the linchpin of the court of appeals' denial of Pan Am's motion. The court of appeals, however, failed to consider the full practical implications of Pan

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[10] *Watson* v. *Merrell Dow Pharmaceuticals*, 769 F.2d at 355-356, involved product liability claims against an American pharmaceutical corporation (and two of its employees) for birth defects suffered by residents of England and Scotland arising out of the use of defendants' drug, Debendox, in those countries. Although defendant Merrell was prepared to stipulate to adjudication of its liability in the United Kingdom, it was not clear whether jurisdiction could be exercised over the individual defendants in that alternative forum (see *id.* at 356-357). The court of appeals affirmed the district court's conditional dismissal of the case against Merrell on *forum non conveniens* grounds, reversed the district court's order dismissing the action against the individual defendants, and remanded for a trial against those defendants in the domestic forum unless they would consent to jurisdiction in the foreign forum (*ibid.*).

Am's agreement to pay all of the judgment.[11] The court considered (*ibid.*) only whether "Pan American's conditional promises * * * ma[d]e all defendants available to plaintiffs in a Uruguayan forum."[12]

We nonetheless do not believe that further review is warranted of the court of appeals' *forum non conveniens* holding. This case is not an appropriate vehicle for considering the validity of the lower court's analysis because the result in this case does not depend on it. The district court's denial of Pan Am's motion would not warrant reversal even applying the flexible analysis reflected in this Court's decisions. Those decisions stress that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed" (*Gilbert*, 330 U.S. at 508), and that the trial court's determination "deserves substantial deference" and "may be reversed only when there has been a clear abuse of discretion" (*Reyno*, 454 U.S. at 257, citing *Gilbert*, 330 U.S. at 511-512 and *Koster*, 300 U.S. at 531). No such "clear

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[11] The court of appeals made much of the limited language of Pan Am's guarantee "to pay 'any judgment rendered against *it*' (emphasis added)" (Pet. App. 42a). In view of Pan Am's concession of liability—presumably for the injuries resulting from the crash—it is difficult to imagine how the absence of the United States from the Uruguayan action would in any way reduce the recovery afforded to plaintiffs.

[12] Of broader concern, the court of appeals' per se approach might prompt plaintiffs to name as a defendant a party who is not amenable to process in a foreign forum, for the sole purpose of anchoring in the United States a lawsuit that both a balance of the convenience and the interests of justice would suggest should be tried in the foreign jurisdiction. As a practical matter, therefore, the court of appeals' approach might increase "[t]he flow of litigation into the United States and further congest already crowded courts" (cf. *Reyno*, 454 U.S. at 252 (footnote omitted)).

abuse of discretion" occurred in this case, where the lawsuit was brought where the accident occurred.[13]

Indeed, the current procedural posture of the case renders reversal of the district court order now especially unjustified. The trial on the merits is now complete.[14]

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[13] The only issue before the district court was the amount of damages to which the individual respondents were entitled because Pan Am was willing to stipulate as to its liability (see Pet. App. 5a). Neither the private or public interests implicated clearly favor the Uruguayan forum over the domestic forum selected by the individual respondents. With regard to the former, although evidence relevant to respondents' familial relationships would likely be more available in the foreign forum, any evidence of damages related to the circumstances of the accident would be in New Orleans. See Pet. App. 7a, 85a. Hence, "the relative ease of access to sources of proof," the "availability of compulsory process," and the "cost of obtaining attendance of willing[] witnesses" did not require dismissal (*Gilbert*, 330 U.S. at 508). Nor are there genuine concerns about either the "enforceability of [the] judgment" or the selection of a forum to " 'vex,' 'harass,' or 'oppress' " the defendant. The action was brought in New Orleans, where the accident occurred (*ibid.*).

Public interest factors likewise do not meet the high standard required for reversal. The district court, which has before it all of the consolidated pre-trial proceedings (see Pet. App. 3a n.1), was plainly familiar with the case and with relevant state law, although "problems in conflict of laws" were presented (compare *id.* at 43a-46a n.38 with *id.* at 51a-67a; see *Reyno*, 454 U.S. at 251). Moreover, because the accident occurred in New Orleans, the matter was "handled at its origin" and citizens in an unrelated forum were not unfairly burdened by jury duty (*Gilbert*, 330 U.S. at 508-509).

[14] In *Van Cauwenberghe* v. *Biard*, cert. granted, No. 87-336 (Nov. 9, 1987), this Court is currently considering a related question: whether a district court's denial of a motion to dismiss for *forum non conveniens* should be immediately appealable as a collateral order under 28 U.S.C. 1291 and *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). One relevant factor in that determination is whether the order is "effectively unreviewable on appeal from final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978); see *String-*

Reversal would mean that the litigation would have to start anew in Uruguay.[15]

2. The second question presented by the petition warrants further review. We suggest, however, that the issue might be more appropriately addressed in *Elias Chan* v. *Korean Air Lines, Ltd.*, petition for cert. pending, No. 87-1055, which raises the identical issue.

The decision of the court of appeals in this case, which embraces the ruling of the Second Circuit in *Robles* v. *Lot Polish Airlines* (*In re Air Crash Disaster at Warsaw, Poland on Mar. 14, 1980*), 705 F.2d 85, cert. denied, 464 U.S. 845 (1983), squarely conflicts with the recent D.C.

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fellow v. *Concerned Neighbors in Action*, No. 85-184 (Mar. 9, 1987). The Fifth Circuit is among those that have concluded that such a ruling should not be considered a collateral order. See *Partrederiet Treasure Saga* v. *Joy Mfg.*, 804 F.2d 308 (1986). In the instant action, the court of appeals concluded (Pet. App. 39a-40a) that "[u]nless the defendant can show that he was greatly prejudiced by the fact that the trial occurred in the particular forum selected by the plaintiff, we believe the trial's occurrence and completion bolsters the district court's original decision to deny the motion to dismiss."

[15] A further complicating procedural factor also suggests that review of the *forum non conveniens* issue is not warranted. The district court denied Pan Am's motion to dismiss before the individual respondents amended their complaint to name the United States as a defendant (see Pet. App. 5a-6a). For this reason, the United States never formally supported Pan Am's motion, moved for dismissal of the action against the United States on *forum non conveniens* grounds, or sought severance of the action against it and a stay pending the filing of a lawsuit against Pan Am in Uruguay. The government also did not address the *forum non conveniens* issue in the court of appeals at either the panel or en banc proceeding. Consequently, although the judgment against Pan Am could now be reversed on *forum non conveniens* grounds, whether the judgment against the United States could likewise be reversed on that ground is not free from doubt.

Circuit decision in *In re Korean Air Lines Disaster of September 1, 1983*, 829 F.2d 1171 (1987), and the Supreme Court of Canada's decision in *Ludecke* v. *Canadian Pac. Airlines, Ltd.*, 98 D.L.R.3d 52 (1979). Both the Second and Fifth Circuits have concluded that the limitations on air carrier liability established by the Warsaw Convention (as modified, in effect, by the Montreal Agreement) do not apply unless the notice of that limitation is printed on the passenger's ticket in at least ten-point type, as required by the Montreal Agreement.[16] They reason that the Warsaw Convention's liability limitations are conditioned on adequate notice and that the Montreal Agreement establishes the standard (ten-point type) that must be met (see 705 F.2d at 89-91).[17]

By contrast, a panel of the District of Columbia Circuit has held that the failure to provide notice of the liability limitation in ten-point type does not preclude an air carrier from availing itself of the limitation. *In re Korean Air Lines Disaster of September 1, 1983*, 829 F.2d 1171, 1173,

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[16] In the Second Circuit case, the notice was printed in 8.5-point type (see 705 F.2d at 86) and in this case it was printed in nine-point type (Pet. App. 91a).

[17] Article 3(1)(e) of the Convention (49 Stat. 3015) provides (Pet. App. 108a) that "[f]or the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars: * * * * * (e) A statement that the transportation is subject to the rules relating to liability established by the convention." Article 3(2) (49 Stat. 3015) provides (Pet. App. 108a):

> The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less [*sic*] be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

1176 (1987), aff'g 664 F. Supp. 1463 (D.D.C. 1985).[18] In so ruling, that court relied, in part, upon a decision of the Supreme Court of Canada, *Ludecke* v. *Canadian Pac. Airlines, Ltd.*, 98 D.L.R.3d 52 (1979), rev'g 53 D.L.R.3d 636 (Que. C.A. 1974), aff'g in part and rev'g in part 12 Av. Cas. (CCH) ¶ 17,191 (Que. Super. Ct. 1971), where the Canadian court found (98 D.L.R. at 57):

> the words of art. 3(2) are plain and can admit of no misunderstanding. The absence, irregularity or loss of a passenger ticket will not affect the existence or the validity of the contract of carriage. The benefit of the limitation will be lost only if no ticket is delivered. The American cases referred to above [including *Lisi*] which hold that delivery of the ticket with an irregularity, that is, a statement as required by art. 1(e) which is illegible, amounts to no delivery of a ticket, ignore this plain language and fail to give effect to a precise statement of the law.

We share the Second and Fifth Circuits' view that the Warsaw Convention's limitation on air carrier liability applies only when adequate notice of that limitation is provided to the passenger. The government's views on this issue were previously outlined in memoranda filed in

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[18] The court of appeals explicitly "adopt[ed] as [its] opinion the comprehensive * * * decision of the district court, reported at 664 F. Supp. 1463" (829 F.2d at 1173). The district court found (664 F. Supp. at 1477-1478) under the Warsaw Convention "that in exchange for virtual strict liability against air carriers, international passengers are limited in their recoveries" and that the Montreal Agreement altered that "*quid pro quo*" only to the extent of raising the amount of recovery to $75,000. Hence, the district court concluded (*id.* at 1476-1478) that the liability limitation amounted to a treaty obligation of the United States entered into by the political branches that the judiciary could not alter. See also *Lisi* v. *Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508, 515 (2d Cir. 1966) (Moore, J., dissenting).

response to this Court's invitation to express the views of the United States in *Alitalia-Linee Aeree Italiane, S.p.A.* v. *Lisi*, 390 U.S. 455 (1968), aff'g by an equally divided court 370 F.2d 508 (2d Cir. 1966). See 67-70 U.S. Memo. at 5-9 (jurisdictional stage); see also 67-70 U.S. Memo. at 1 (merits brief).[19]

We also believe that the Montreal Agreement provides the standard—ten-point type—by which the adequacy of notice should be measured. As described by the Second Circuit (705 F.2d at 88 (footnote omitted)), "[t]he Montreal Agreement is by its very terms a 'special contract' under Article 22(1) of the Convention, which provides that a carrier and passenger 'may agree to a higher limit of liability.' " Under that agreement, "[i]n return for waiving the Article 20(1) ['all necessary measures'] defense and complying with the notice requirement [of ten-point type], carriers receive the benefit of a liability limitation of $75,000" (705 F.2d at 88). The D.C. Circuit's contrary ruling is based on the erroneous premise that adequate notice is not a precondition of invoking the liability limitation under the Warsaw Convention (see 664 F. Supp. at 1476).

We conclude reluctantly that the present conflict concerning the meaning of the Warsaw Convention and the Montreal Agreement justifies this Court's review. Although one might expect that the problem is easily eliminated by the consistent use of ten-point type, that resolution has proven elusive. Review by this Court would seem to be the only means of reestablishing uniformity among American courts on an issue of significant financial importance that may be expected to recur. We suggest, however, that review of this issue might be more appropriate in *Elisa Chan* v. *Korean Air Lines, Ltd.*,

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[19] We have provided the parties in this case with copies of those two prior memoranda.

petition for cert. pending, No. 87-1055, which raises the identical issue. In that case, unlike this one, the application of the Warsaw Convention's liability limitation would have a practical impact on the amount of damages ultimately paid by the parties.[20] Respondent in No. 87-1055 also supports certiorari in that case (see 87-1055 Resp. Memo. at 5).

CONCLUSION

The petition for a writ of certiorari should be denied with respect to question 1. The petition should be held with respect to question 2 pending this Court's disposition of the petition in No. 87-1055.

Respectfully submitted.

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[20] Prior to trial, Pan Am and the United States entered into a sharing agreement in which each agreed to pay a fixed percentage of any damages awarded to the individual respondents. Hence, because the Convention's liability limitation does not apply to the United States, the amount of damages paid by Pan Am in this case will not be affected by that limitation, except to the extent that the United States, unlike Pan Am, is not liable for prejudgment interest (see Pet. App. 96a).

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